(2)

No. 92-1662

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH STUART GRANDERSON, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Under 18 U.S.C. 3565(a), a defendant who was originally sentenced to a term of probation and who is found to have violated a condition of his probation ordinarily may be continued on probation or may have his sentence of probation revoked, in which case the court may impose any other sentence "that was available" at the time of the defendant's original sentence. If the defendant is found to be in possession of a controlled substance, however, the court must revoke the sentence of probation and must sentence the defendant to "not less than one-third of the original sentence." The question presented is whether the court of appeals erred in concluding that the phrase "original sentence" as used in Section 3565(a) refers to the maximum term of imprisonment under the Sentencing Guidelines sentencing range applicable to the defendant at the time of his original sentencing hearing, instead of to the sentence of probation actually imposed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 969 F.2d 980.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on August 4, 1992. A timely petition for rehearing was denied on November 30, 1992. Pet. App. 16a-17a. On February 19, 1993, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including April 15, 1993. The petition for a writ of certiorari was filed on April 15, 1993, and was granted on June 28, 1993. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND GUIDELINES INVOLVED

The pertinent provisions of 18 U.S.C. 3565, 18 U.S.C. 3583, and the Sentencing Guidelines are reproduced at App., *infra*, 1a-4a.

STATEMENT

1. Pursuant to a guilty plea entered in the United States District Court for the Northern District of Georgia, respondent was convicted on one count of delay or destruction of mail, in violation of 18 U.S.C. 1703(a). Pet. App. 2a. The statutory maximum penalty for respondent's offense was five years' imprisonment and a $250,000 fine. See 18 U.S.C. 1703(a), 3571. Under the Sentencing Guidelines, the potential imprisonment range, in light of respondent's adjusted offense level and criminal history category, was zero to six months. Pet. App. 2a. The district court did not impose a sentence of imprisonment, but instead imposed a sentence of five years' probation and a $2,000 fine. R1-7, at 2, 4. The conditions of respondent's probation included the requirement that he undergo periodic testing for illegal drug use. Pet. App. 2a.

On June 28, 1991, respondent's probation officer filed a petition for revocation of respondent's probation, alleging that "[respondent] has possessed/used drugs in that on 5-10-91 and 6-7-91, [respondent] rendered urine samples which tested positive for cocaine metabolite." R1-10, at 1. Thereafter, the district court held a hearing on the petition to revoke the sentence of probation. The court found that respondent had possessed controlled substances within the meaning of 18 U.S.C. 3565(a), which provides that when "a defendant is found by the court to be

in possession of a controlled substance * * * the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." Accordingly, the court revoked respondent's probation. See J.A. 16-17, 21; Pet. App. 12a-13a.[1]

Applying 18 U.S.C. 3565(a), the district court determined that it was required to sentence respondent to a prison term that was at least one-third the length of respondent's original sentence of probation. The court reasoned that the phrase "original sentence" as used in Section 3565(a) referred to the original sentence of probation actually imposed on respondent, not the potential sentence of imprisonment available under the applicable Guidelines sentencing range at the time of respondent's initial sentencing. Pet. App. 13a-14a. Accordingly, the court sentenced respondent to 20 months' imprisonment—one-third of the original five-year sentence of probation—to be followed by a three-year period of supervised release. Pet. App. 14a; J.A. 21.

2. The court of appeals upheld the order revoking respondent's probation, but vacated his sentence. Pet. App. 1a-11a. The court began its analysis by noting

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[1] Respondent admitted having used drugs, but he argued that use did not qualify as possession so as to require revocation of probation under Section 3565(a). J.A. 9-10. The government contended that knowing and voluntary drug use is inevitably accompanied by possession. J.A. 11. The district court found in favor of the government on that issue. See J.A. 16; Pet. App. 13a. The court of appeals rejected respondent's challenge to that ruling (Pet. App. 3a-4a), and this Court denied respondent's petition for a writ of certiorari raising that issue. *Granderson* v. *United States*, cert. denied, No. 92-8824 (June 28, 1993). Accordingly, that issue is not before the Court.

the existence of a circuit conflict on the meaning of the phrase "original sentence" as used in 18 U.S.C. 3565(a). Pet. App. 5a-6a, citing *United States* v. *Corpuz*, 953 F.2d 526 (9th Cir. 1992) (holding that "original sentence" refers to the original sentence of probation), and *United States* v. *Gordon*, 961 F.2d 426 (3d Cir. 1992) (holding that "original sentence" refers to the sentencing range that was available under the Guidelines at the time the defendant was initially sentenced).[2] Aligning its decision with the Third Circuit's approach in *Gordon*, the court of appeals rejected the government's contention that the phrase "original sentence" in Section 3565(a) refers to the original sentence of probation imposed on the defendant. The court further explained that "[t]he statute does not specify whether the phrase 'original sentence' refers to the term of probation or to the range of incarceration established by the Guidelines,"

[2] Four courts of appeals—the Eleventh Circuit below, the Tenth Circuit in *United States* v. *Diaz*, 989 F.2d 391 (1993), the Sixth Circuit in *United States* v. *Clay*, 982 F.2d 959 (1993), petition for cert. pending, No. 93-52, and the Third Circuit in *United States* v. *Gordon*, 961 F.2d 426 (1992)—have held that the phrase "original sentence" as used in 18 U.S.C. 3565(a) refers to the sentencing range applicable to the defendant under the Sentencing Guidelines when the defendant was initially sentenced. Three other courts of appeals—the Fifth Circuit in *United States* v. *Sosa*, No. 92-9022, 1993 U.S. App. LEXIS 19953 (5th Cir. Aug. 3, 1993), the Eighth Circuit in *United States* v. *Byrkett*, 961 F.2d 1399 (1992), and the Ninth Circuit in *United States* v. *Corpuz*, 953 F.2d 526 (1992)—have held that the phrase "original sentence" in Section 3565(a) refers to the sentence of probation initially imposed on the defendant, so that a district court must sentence a probationer whose probation is revoked for possession of drugs to a prison term at least one-third as long as his original term of probation.

and accordingly concluded that "the rule of lenity comes into play" to resolve that ambiguity in favor of criminal defendants. Pet. App. 6a.

Noting that respondent's Guidelines sentencing range was zero to six months' imprisonment, the court of appeals declined to construe Section 3565(a) to permit imposition of a longer sentence upon revocation of probation. The court reasoned that "[t]he length of [respondent's] original sentence is limited by the Guideline range available at the time that he was sentenced to probation. If [respondent] could not be subjected to [20] months incarceration for the crime of which he was convicted, he cannot now be sentenced to that term for violation of his probation." Pet. App. 8a.

The court declined to follow the contrary reasoning of the Ninth Circuit in *United States* v. *Corpuz*, 953 F.2d 526 (1992), and the Eighth Circuit in *United States* v. *Byrkett*, 961 F.2d 1399 (1992). See Pet. App. 8a-9a & n.3. In concluding that the phrase "original sentence" referred to the defendant's original sentence of probation, those courts relied on the fact that probation, like incarceration, is a type of sentence under current federal sentencing law. The court of appeals found that reasoning to be flawed because "[p]robation and imprisonment are not fungible." *Id.* at 9a.

The court of appeals also rejected the Ninth Circuit's reliance on analogous language in 18 U.S.C. 3583(g). Under that provision, a defendant who possesses controlled substances while on supervised release must have his supervised release terminated and must be sentenced to "not less than one-third of

the term of supervised release." Reasoning that supervised release is "different from probation," the court of appeals rejected the contention that Section 3565(a) and Section 3583(g) should be construed in a similar fashion to achieve similar sentencing results. Pet. App. 9a-10a.

Instead, the court of appeals pointed to 18 U.S.C. 3565(b), which provides that when a defendant possesses a firearm while on probation the court shall revoke the defendant's probation and sentence the defendant to "any other sentence that was available" at the time of the initial sentencing. Conceding that the language of Section 3565(b) differs from the relevant language of Section 3565(a), the court nonetheless found it "unlikely" that Congress "intended that the use of two slightly different phrases in two otherwise similar provisions would lead to such dramatically different results." Pet. App. 10a. Accordingly, the court vacated respondent's sentence of imprisonment. Because respondent had already served more than the six-month sentence of imprisonment that was the maximum that could have been imposed under the court of appeals' interpretation of Section 3565(a), the court ordered that respondent be released immediately.

SUMMARY OF ARGUMENT

Under 18 U.S.C. 3565(a), when a defendant possesses illegal drugs while on probation, the district court must "revoke the sentence of probation" and "sentence the defendant to not less than one-third of the original sentence." The court of appeals held that the phrase "original sentence" as used in Section 3565(a) refers to the Sentencing Guidelines range

that was applicable at the time the defendant was sentenced. That interpretation is refuted by the language, structure, and legislative history of the statute.

The drug-possession revocation provision of Section 3565(a) expressly mandates that probationers who possess controlled substances must have their probation revoked, and in context it is clear that those probationers must then be sentenced to a term of imprisonment. A contrary reading of the statute would make no sense at all, because it would require a court to impose a term of probation only one-third as long as the term the probationer was already serving. Every court of appeals to address this issue has agreed that the mandatory revocation provision of Section 3565(a) requires imposition of a term of imprisonment. Thus, the only remaining question is how long that term must be.

The ordinary meaning of the word "original" as used in Section 3565(a) is "initial." Thus, the natural meaning of the phrase "original sentence" is the sentence the defendant received at his initial sentencing. The court of appeals' conclusion that "original sentence" means the Guidelines range applicable at the initial sentencing is impossible to square with the language, structure, and purpose of Section 3565(a). In the first place, Section 3565(a) applies only to defendants who are on probation. In all cases to which Section 3565(a) applies, therefore, the Guidelines imprisonment range was available to, but rejected by, the sentencing court in favor of a sentence of probation. The court of appeals' conclusion that "original sentence" means the Guidelines range that was rejected at the initial sentencing thus

requires that the term "original" be read to mean "initially available but rejected."

When a defendant's probation is revoked for any violation of a condition of probation other than possession of a controlled substance, Section 3565 directs the district court to impose any other "sentence that was available * * * at the time of the initial sentencing." 18 U.S.C. 3565(a)(2) and (b). The court of appeals construed that phrase and "original sentence" to be equivalent, but "available" is simply not the same as "original," and Congress's use of different words in the same statute suggests that it intended them to have different meanings. That assumption is particularly strong in this case, because the drug-possession revocation provision of Section 3565(a) begins with the phrase "[n]otwithstanding any other provision of this section," thereby rebutting any suggestion that Congress intended there to be no differences between that provision and the remainder of Section 3565(a).

A review of other statutory provisions that include the phrase "original sentence" demonstrates that Congress invariably uses that phrase to refer to the initial sentence that was actually imposed on a defendant, not the range of sentences that was available to, but rejected by, the sentencing court. There is no reason to believe that Congress intended the phrase to have a different meaning in Section 3565(a).

The court of appeals' analysis is further flawed by the fact that the Guidelines sentence that was available at a probationer's initial sentencing hearing is always a range, often zero to six months' imprisonment. The logic of the court of appeals' opinion would

suggest that Section 3565(a) mandates a minimum term of imprisonment equal to only one-third of that Guidelines range, or zero to two months. Under that approach, the effect of Section 3565(a) would be to permit many defendants who possess drugs while on probation to receive no term of imprisonment at all, while at the same time freeing them of their previous probation obligations as well.

Perhaps in recognition of that flaw in equating the "original sentence" with the Guidelines range, the court of appeals appears to have assumed that the statutory "one-third of the original sentence" is to be computed by reference solely to the top of the initially applicable Guidelines range. Nothing in the logic of the court's opinion provides any basis for that assumption, however, or explains why the minimum sentence under Section 3565(a) could not more appropriately be determined by reference to the *bottom* of the applicable Guidelines range.

The background of Section 3565(a) confirms that Congress intended to require a substantial period of incarceration for probationers found in possession of controlled substances. The drug-possession revocation provision was added as part of the Anti-Drug Abuse Act of 1988, and the text and legislative history of that Act make unmistakably clear Congress's intent to deter drug use and possession by imposing harsh new penalties on persons who engage in those activities. Construing Section 3565(a) to permit imposition of a new and shorter sentence of probation or a sentence of imprisonment that is only one-third as long as the original Guidelines range would undermine that congressional intent.

Moreover, the 1988 Act amended federal sentencing law to require that persons who possess controlled substances while on supervised release would have their supervised release revoked and be sentenced to a term of imprisonment that was "not less than one-third of the term of supervised release." That provision was contained in the same section of the 1988 Act as the drug-possession provision of Section 3565(a), and both provisions were directed at precisely the same problem, so it is reasonable to construe them *in pari materia* to call for parallel treatment of drug offenders who are under non-custodial supervision.

The rule of lenity is not applicable in this case. That rule comes into play only in cases involving a "grievous ambiguity or uncertainty in the language and structure of the Act" that cannot be resolved by recourse to the normal tools of statutory construction. *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991). In this case, the language of the statute unambiguously provides that a defendant's sentence of imprisonment upon revocation of probation for possession of a controlled substance must be at least one-third as long as the original sentence of probation, and accordingly there is no room for lenity.

ARGUMENT

A CONVICTED DEFENDANT WHO POSSESSES CONTROLLED SUBSTANCES WHILE ON PROBATION MUST HAVE HIS PROBATION REVOKED AND BE SENTENCED TO A TERM OF IMPRISONMENT THAT IS AT LEAST ONE-THIRD THE LENGTH OF HIS ORIGINAL SENTENCE OF PROBATION

Under 18 U.S.C. 3565(a), when a defendant possesses illegal drugs while on probation the district court must "revoke the sentence of probation" and "sentence the defendant to not less than one-third of the original sentence." The court of appeals held that the phrase "original sentence" as used in Section 3565(a) refers to the Sentencing Guidelines range that was applicable at the time the defendant was sentenced, not the sentence of probation that the defendant actually received.

The court of appeals' interpretation of Section 3565(a) is refuted by the language, structure, and legislative history of the statute. The only reasonable construction of Section 3565(a) is that it mandates a sentence of imprisonment that is at least one-third as long as the defendant's original sentence of probation. That conclusion can be reached in three steps. First, under current law probation is a kind of sentence, so there is no anomaly in the statute's reference to the term of probation as the "original sentence" imposed on a probationer. Second, when a probationer is found in possession of controlled substances, Section 3565 requires the sentencing court to revoke his sentence of probation and impose a sentence of imprisonment in its place; a reimposition of probation is not permitted. Third, the sentence of imprisonment must be at least one-third as long as the sentence of probation that it replaces.

A. Probation Is A "Sentence" Within The Meaning Of Section 3565

The language and legislative history of the governing statute make clear that probation is a "sentence" for purposes of federal sentencing law in general and Section 3565 in particular. Prior to 1984, the federal sentencing scheme treated probation as an alternative to a sentence, rather than as a sentence in its own right. See 18 U.S.C. 3651 (1982) (authorizing district courts to "suspend the imposition or execution of sentence and place the defendant on probation"); see generally *United States* v. *Corpuz*, 953 F.2d at 528. In the Sentencing Reform Act of 1984, however, Congress worked substantial changes in the system of federal sentencing. See Pub. L. No. 98-473, § 212, 98 Stat. 1987. In particular, the Act rejected the traditional view of probation as merely a reprieve from a prison sentence. As the Committee Report accompanying that Act declared, "[p]roposed 18 U.S.C. 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 88 (1983).

The text of Section 3565 itself makes clear that the word "sentence" encompasses probation. The first portion of Section 3565(a) provides that when a probationer violates a term of his probation, the court ordinarily may either continue him on probation or "revoke the sentence of probation." If the probationer is found in possession of drugs or a firearm, the statute mandates revocation of "the sentence of probation." 18 U.S.C. 3565(a) and (b). Those several references to probation as a "sentence" in the very section at issue here make clear that Congress did not mean to exclude the sentence of probation when

it referred to the defendant's "original sentence" in connection with the drug-possession revocation provision in Section 3565(a).

Other provisions of Title 18, Chapter 227, Subchapter B of the United States Code—the portion of the Code that governs probation—also refer to probation as a form of sentence. See 18 U.S.C. 3561(a) ("A defendant * * * may be sentenced to a term of probation."); 18 U.S.C. 3563(a) ("a sentence of probation"); 18 U.S.C. 3564(a) ("A term of probation commences on the day that the sentence of probation is imposed."). In keeping with that statutory mandate, the United States Sentencing Commission has declared that probation is a type of sentence under current law. See Sentencing Guidelines § 7A2(a) ("the Sentencing Reform Act recognized probation as a sentence in itself"). Thus, there can be no dispute that probation is a "sentence" as that word is used in Section 3565.[3]

[3] Some courts of appeals have erroneously concluded that probation is not a sentence and have relied on that conclusion as a basis for holding that the phrase "original sentence" in Section 3565(a) does not refer to the defendant's original sentence of probation. See *United States* v. *Clay*, 982 F.2d 959, 962 (6th Cir. 1993) (declining to treat probation as a "sentence" for purposes of Section 3565(a) because "the term 'original sentence' should mean what it has always meant—a sentence of imprisonment"), petition for cert. pending, No. 93-52; *United States* v. *Gordon*, 961 F.2d 426, 432 (3d Cir. 1992) (holding that statutory references to probation as a "sentence" worked "merely a change in form, rather than substance," and thus that Congress could not have intended the phrase "original sentence" to refer to the original sentence of probation). The court of appeals in this case conceded that probation is a sentence under current law (Pet. App. 5a), but nonetheless relied on the Third Circuit's errone-

B. When A Probationer Is Found In Possession Of Controlled Substances, The Court Must Revoke Probation And Impose A Term Of Imprisonment

The statutory language leaves no doubt that when a probationer is found to be in possession of controlled substances, Section 3565 mandates that his probation be revoked and that he be sentenced to a term of imprisonment. The statute is explicit that, upon a finding that the probationer has possessed drugs during his term of probation, the sentencing court must revoke his probation. While the statute does not expressly state that the court must then impose a sentence of imprisonment, the language of the statute, in context, makes it clear that imprisonment is required.

Section 3565(a) provides that a court normally has two options when a defendant violates a condition of his probation. First, the court may continue the defendant on probation, with or without extending the term of probation or modifying or enlarging the probationary conditions, see 18 U.S.C. 3565(a)(1). In the alternative, the court may revoke the sentence of probation and impose "any other sentence that was available * * * at the time of the initial sentencing," 18 U.S.C. 3565(a)(2). By distinguishing between revocation of probation and its continuation, Section 3565(a) makes it clear that the consequence of revocation is that the probationer is no longer to enjoy the benefits of probation, and that a different sentence must be imposed in its place. Accordingly, the provision in Section 3565(a) that requires a court to revoke the probation of a defendant who is found in possession of controlled substances cannot be read to permit the imposition of a new sentence of probation; instead, it requires the termination of conditional release and the imposition of a sentence of imprisonment in its place.

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ous reasoning in *Gordon* as a basis for concluding that respondent's sentence of probation was not his "original sentence." Pet. App. 9a.

If the statute were read to permit the reimposition of probation after the mandatory revocation required in the case of drug-possession violations, the mandatory minimum term requirement would make no sense at all, since it would "require" a court to impose a term of probation only one-third as long as the term the offending probationer was already serving. By imposing a mandatory revocation requirement, Congress plainly intended to terminate the defendant's enjoyment of probation, as it did in the related provision requiring mandatory revocation of probation for probationers found in possession of a firearm, 18 U.S.C. 3565(b).

The court of appeals in this case, like every court of appeals that has addressed this issue, acknowledged that the mandatory revocation provision of Section 3565(a) requires the imposition of some term of imprisonment. See Pet. App. 4a; *United States* v. *Diaz*, 989 F.2d 391, 391 n.1 (10th Cir. 1933); *United States* v. *Clay*, 982 F.2d 959, 964 (6th Cir. 1993), petition for cert. pending, No. 93-52; *United States* v. *Gordon*, 982 F.2d at 964. The only remaining question is how long that term of imprisonment must be.

C. The Phrase "One-Third Of The Original Sentence" In Section 3565 Means A Period Of Imprisonment One-Third As Long As The Original Sentence Of Probation Imposed On The Defendant

The United States Code does not contain a definition of the word "original" as it is used in Section

3565(a). Accordingly, that word should be given "its ordinary or natural meaning." *Smith* v. *United States*, 113 S. Ct. 2050, 2504 (1993); see *Chapman* v. *United States*, 111 S. Ct. 1919, 1925 (1991); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). In this context, the word "original" plainly means "initial." *Webster's Third New International Dictionary* 1592 (1986). The "ordinary or natural meaning" of the phrase "original sentence," then—as common sense would suggest—is the sentence that a defendant receives at his initial sentencing, *i.e.*, the sentence imposed at the beginning of a defendant's placement in the correctional system.

The court of appeals rejected that common-sense reading of the phrase "original sentence," concluding instead that it refers to the presumptive range of imprisonment that was prescribed by the Sentencing Guidelines at the time of the defendant's initial sentencing. That conclusion, however, is impossible to square with the language, structure, and purpose of Section 3565(a).

1. Section 3565 applies only to defendants who are on probation. In order for a defendant to be subject to the requirements of Section 3565(a), therefore, it must be the case that he did not receive a sentence of imprisonment from within the range suggested by the Guidelines at his initial sentencing. Thus, in all cases to which Section 3565(a) applies, the presumptive imprisonment range prescribed by the Guidelines is a sentence that was available to, but was rejected by, the sentencing court at the defendant's initial sentencing. In effect, then, the court of appeals' holding—that the phrase "original sentence" refers to the Guidelines range rather than the sentence of probation that was actually imposed—rests on the curious construction of the word "original" in Section 3565(a) to mean "initially available but rejected."

That is not one of the possible meanings of the word "original" as it is used in the English language: "original" simply does not mean "available," as opposed to "actual"; it means "initial," as opposed to "subsequent" or "final." As Judge Greenberg cogently observed in *United States* v. *Gordon*, "as a simple matter of plain meaning, I do not understand how the term 'original sentence' * * * can be equated to the maximum available sentence under the guideline range in cases such as this where the maximum available sentence has not been imposed. To me the term 'original sentence' means an actual as contrasted to an 'available' sentence." 961 F.2d at 434 (Greenberg, J., concurring in judgment).

2. Even if the meaning of the phrase "original sentence" were not clear on its face, the context of that phrase would compel the conclusion that it refers to the actual sentence of probation that was initially imposed on a defendant, not the range of custodial sentences that could have been imposed.

a. When a defendant's probation is revoked for possession of a firearm or for any other violation of a probation condition (except possession of a controlled substance), Section 3565 directs the district court to impose any other sentence "that was available * * * at the time of the initial sentencing." 18 U.S.C. 3565(a)(2) and (b). Although the court of appeals construed the phrase "available * * * at the time of the initial sentencing" as equivalent to the phrase "original sentence" in Section 3565(a), Pet. App. 10a, the term "available" is simply not the same

as "original." In fact, the two terms have sharply different meanings, and in the absence of any other plausible explanation it must be assumed that Congress used those two different words in the same statute because it wished to convey different meanings. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991).

That assumption is particularly compelling in this case, because the "original sentence" language of Section 3565(a) and the "sentence that was available * * * at the time of the initial sentencing" language of Section 3565(b) are both part of a short statutory provision, and were both added to Title 18 as part of the same legislation. See Pub. L. No. 100-690, §§ 6214(2), 7303(a)(2), 102 Stat. 4361, 4464. Had Congress intended the two amendments to have the same meaning, it is reasonable to suppose that Congress would have used the same language in each.

b. A further indication that Congress meant the phrase "original sentence" to have a meaning distinct from the phrase "sentence that was available" is that the portion of Section 3565(a) dealing with the revocation of probation for persons found in possession of drugs begins with the phrase "[n]otwithstanding any other provision of this section." That phrase rebuts any suggestion that Congress intended there to be no inconsistencies between the general revocation provision of Section 3565(a) and the provision dealing with drug-possession revocations. The court of appeals thus erred in imposing on the phrase "original sentence" a meaning that would be unrecognizable to the lay reader solely in order to render that phrase "consistent with the rest of the statute." Pet. App. 10a; see also *United States* v. *Clay*, 982 F.2d at 963; *United States* v. *Gordon*, 961 F.2d at 431.

c. A review of other statutory provisions that include the phrase "original sentence" demonstrates that Congress invariably uses that phrase to refer to the initial sentence that was actually imposed on the defendant, not the range of sentences that were available to, but rejected by, the sentencing court. For example, district courts are authorized to correct previously imposed sentences when a case is remanded "for further sentencing proceedings if, after such proceedings, the court determines that the *original sentence* was incorrect." Fed. R. Crim. P. 35(a)(2) (emphasis added). Obviously, the "original sentence" referred to in Rule 35(a)(2) cannot be a sentence that was available at the time of the initial sentencing but that was rejected in favor of some other sentence; rather, it means precisely what the natural import of the words suggests: the sentence that was actually imposed on the defendant.

Similarly, in authorizing rehearings in military court-martial cases, Congress has declared that "[u]pon a rehearing * * * no sentence in excess of or more severe than the *original sentence* may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory." 10 U.S.C. 863 (emphasis added). The phrase "original sentence" as used in that statute plainly refers to the sentence that was imposed after the original court-martial, not to the potential alternative sentences that were rejected.

Finally, the United States Parole Commission has statutory authority to respond to parole violations in a number of ways, including by "refer[ring] the parolee to a residential community treatment center

for all or part of the remainder of his *original sentence*." 18 U.S.C. 4214(d)(4) (1982) (emphasis added) (repealed as to crimes committed after November 1, 1987, see Pub. L. No. 98-473, Tit. II, § 218(a)(5), 98 Stat. 2027). That provision would be nonsensical if the phrase "original sentence" were construed in the manner suggested by the court of appeals in this case.

3. The court of appeals' interpretation of the phrase "original sentence" is further flawed by the fact that the sentence of imprisonment that could have been imposed at the initial sentencing hearing in lieu of probation is generally not determinate. In all cases in which probation is available, the Guidelines set forth a presumptive range of imprisonment: 0-6 months, 1-7 months, 2-8 months, 3-9 months, 4-10 months, or 6-12 months. See Sentencing Guidelines, ch. 5, pt. A (Sentencing Table); *id.* § 5B1.1(a); App., *infra*, 3a-4a. It is awkward, at best, to speak of imposing a sentence that is "not less than one-third of" a *range* of imprisonment. Yet that is the logical import of the court of appeals' construction of the statute.

Moreover, the court of appeals' interpretation, if applied literally, would lead to a result clearly at odds with the purpose of the statute. Many of the crimes for which probation is available in lieu of imprisonment carry presumptive sentencing ranges of zero to six months. See Sentencing Guidelines, ch. 5, pt. A (Sentencing Table); *id.* § 5B1.1(a); App., *infra*, 3a-4a. The logic of the court of appeals' opinion would thus suggest that Section 3565(a) mandates a minimum term of imprisonment equal to one-third of that range, *i.e.*, zero to two months. As a result, the drug possession sentencing provision of Section

3565(a), which was intended to ensure that many probationers found to have violated probation by possessing drugs should serve a significant mandatory period of incarceration, could result in probation violators serving no term of imprisonment at all, and being freed from their previous probation obligations as well.

Perhaps in recognition of that difficulty with its interpretation of the statute, the court of appeals appears to have assumed (and other courts have expressly held) that the statutory minimum "one-third of the original sentence" is to be computed by reference solely to the top of the Guidelines sentencing range that was applicable at the defendant's initial sentencing. See *United States* v. *Gordon*, 961 F.2d at 431; *United States* v. *Clay*, 982 F.2d at 964. Even assuming that those courts were correct in holding that "original sentence" refers to the Guidelines range applicable at the initial sentencing hearing, however, it is difficult to discern any basis for concluding that only the maximum Guidelines sentence is to be considered for purposes of Section 3565(a). None of the courts that have adopted that reading of the statute has offered any justification for doing so, and there is nothing in the logic of those courts' opinions that explains why the minimum sentence under Section 3565(a) could not more appropriately be determined by reference to the minimum term of imprisonment that was originally available under the Guidelines. That those courts must disregard the logic of their own statutory analysis in order to avoid an absurd result is further proof that their interpretation of Section 3565(a) is fundamentally flawed.

The implausibility of those courts' interpretation of Section 3565(a) is further demonstrated by the fact that the maximum sentence of imprisonment prescribed by the Guidelines is merely a presumptive sentence from which the sentencing court may depart in appropriate circumstances. 18 U.S.C. 3553(b). If "original sentence" really means "maximum available sentence," as those courts have apparently concluded, the appropriate benchmark for purposes of Section 3565(a) should be the maximum sentence authorized by law for the defendant's crime—in this case, five years' imprisonment. See 18 U.S.C. 1703(a). Thus, it appears that what the court of appeals has actually held in this case is that "original sentence" means "maximum available sentence under the Sentencing Guidelines without consideration of a possible departure from the Guidelines sentencing range." That is too much weight for the simple statutory phrase "original sentence" to bear.

D. The Background Of Section 3565(a) Confirms That Congress Intended To Require A Substantial Period Of Incarceration For Probationers Found In Possession Of Controlled Substances

1. The drug-possession provision of Section 3565(a) was enacted as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, which was the culmination of a comprehensive effort by Congress to address the problems created by drug abuse. The text and legislative history of that Act manifest Congress's intent to impose enhanced punishments on persons who use and possess illegal drugs.

a. The text of the 1988 Act makes unmistakably clear Congress's intent to reduce drug abuse by increasing the disincentives to drug possession and use by individuals. The Act's statement of purpose endorses "proposals to attack directly the supply of, and demand for, illicit drugs, such as proposals to strengthen and expand penalties for sale and use." 1988 Act § 6201(2), 102 Stat. 4359. In addition, the Act contains congressional findings that "illegal drug use is prevalent in the workplace and endangers fellow workers, national security, public safety, company morale, and production," and that "winning the drug war not only requires that we do more to limit supply, but that we focus our efforts to reduce demand." 1988 Act § 5251(a)(9) and (21), 102 Stat. 4309-4310.

In keeping with those findings, Congress mandated a number of harsh new penalties for persons who possess and use illegal drugs. The Act provides, *inter alia*, that persons who possess illegal drugs are to be denied federal benefits (1988 Act § 5301(b), 102 Stat. 4311); that public housing tenants who engage in illegal drug-related activity will have their tenancies terminated (1988 Act § 5101, 102 Stat. 4300); and that federal contractors and grant recipients will be required to maintain drug-free workplaces and to discipline employees who use or possess illegal drugs (1988 Act §§ 5152(a), 5153(a), 102 Stat. 4304-4305, 4306). The Act also directs the President to transmit to Congress a report recommending other methods to "achieve the goal of discouraging the trafficking and possession of controlled substances." 1988 Act § 5301(g)(1)(D), 102 Stat. 4312.

In addition, the Act contains numerous provisions that dramatically increase the criminal penalties for drug possession, drug trafficking, and related conduct. See, *e.g.*, 1988 Act §§ 6371 (enhanced penalties for possession of crack cocaine), 6452 (life imprisonment for three-time drug offenders), 6457-6458 (enhanced penalties for possession of drugs with intent to distribute them near schools, playgrounds, youth centers, etc.), 6468 (enhanced penalties for federal prisoners who commit drug offenses in prison), 6480 (enhanced penalties for simple possession), 7001 (death penalty for drug-related killings), 102 Stat. 4370, 4371, 4373, 4376, 4382, 4387-4395. Finally, in the Section at issue here, the Act mandates that criminal defendants who possess controlled substances while on probation or supervised release must have their probation or supervised release revoked and receive sentences equal to "not less than one third of" their original sentence or term of supervised release. 1988 Act § 7303, 102 Stat. 4464.

b. The legislative history of the 1988 Act provides additional evidence—if any were needed—of Congress's determination to attack the demand for illegal drugs by imposing harsher punishments on drug users and possessors as well as drug traffickers. Although the Act's legislative history does not focus on the precise meaning of the provision at issue in this case,[4] there is no doubt that the Members of Congress

[4] The section-by-section analysis of the criminal law provisions of the 1988 Act, which was prepared by Senator Biden as chairman of the Senate Judiciary Committee (see 134 Cong. Rec. 32,692 (1988)), contains only the following discussion of the relevant section of the Act:

> *Section 7303* amends various provisions of title 18 relating to parole, probation and supervised release making it a mandatory condition of those alternatives to incarceration that the defendant not possess any controlled substance, and making revocation of parole, probation, or supervised release automatic upon a finding that the defendant violated that condition. This provision applies to all persons whose parole, probation, or supervised release begins on or after January 1, 1989, regardless of the date of the offense or of the imposition of sentence.

134 Cong. Rec. 32,707 (1988). No committee report was prepared for the 1988 Act itself, and the reports discussing various bills that anticipated the bill that was ultimately enacted shed no light on the precise question presented here.

who voted for the 1988 Act did so with the full understanding and intention that it would provide harsh medicine for persons who chose to use or possess illegal drugs.[5] In light of that background, it is diffi-

[5] See, *e.g.*, 134 Cong. Rec. 32,632 (1988) (remarks of Sen. Byrd) (asserting that the Act would "[s]trengthen our penalties for possession and for trafficking; [a]nd, for the first time, add strong legal disincentives for those who would casually use drugs."); *id.* at 32,633-32,634 (remarks of Sen. Dole) ("tonight we will shift attention to the other side—we will direct the spotlight on ourselves. Drug users in this country—whether addicted or an occasional abuser—are behind the problem—they are the ones to blame. * * * [W]e should blame the user—the abuser of the drug. For they are the ones who are bringing these killings into our towns and cities. * * * So for the first time in about 20 years, we will focus attention back on the crime—in most cases the felony—of possession of illicit drugs"); *id.* at 32,638 (remarks of Sen. McConnell) ("[W]hile the Federal Government has fired shots across the bow of the illegal drug industry in the past, this Congress now has aimed one below the waterline: At the drug abuser. * * *

cult to believe that Congress intended in Section 3565 to authorize courts to impose a sentence for drug possession during probation consisting of only a period of probation one-third as long as the period the defendant was already serving, or a period of imprisonment only one-third as long as the period the Sentencing Guidelines would have indicated as a proper sentence for his underlying crime.

2. That conclusion receives further support from Congress's treatment of a similar issue in the context of supervised release. Under 18 U.S.C. 3583(g), a defendant who is found in possession of a controlled substance during a term of supervised release must be sentenced to a term of imprisonment that is "not less than one-third of the term of supervised release." Congress obviously viewed that provision and Section 3565(a) as parallel and closely related, because it included both of them in the same section of the Anti-Drug Abuse Act of 1988. See Pub. L. No. 100-690, Tit. VII, § 7303(a)(2) ("one-third of the original sentence") and (b)(2) ("one-third of the term of supervised release"), 102 Stat. 4464. Those two provisions were directed at precisely the same problem, and it is therefore reasonable to construe them *in*

[The] so-called casual users continue to finance the enemy[.] * * * [T]he drug-abuser's recreational habit pays for the bullets that kill police officers and innocent bystanders in the drug war"); *id.* at 33,284 (remarks of Rep. McCollum) ("[W]e are sending a message in this bill for this first time to those who would be users and those who are users, that if they choose to go this path * * * no, they should not do it, but if they choose to go anyway, there will be a price to pay that will be higher than they want to pay."); *id.* at 33,289 (remarks of Rep. Gilman) ("This legislation stiffens penalties on drug dealers and drug users.").

pari materia to call for parallel treatment of drug offenders who are under non-custodial supervision.

Some courts of appeals have rejected the analogy between Sections 3565(a) and 3583(g), noting that the latter provision determines the minimum sentence upon revocation by reference to "the term of supervised release," whereas the former refers to the "original sentence" instead. See *United States* v. *Diaz*, 989 F.2d at 393 & n.2; *United States* v. *Clay*, 982 F.2d at 963-964; *United States* v. *Gordon*, 961 F.2d at 431 & n.5. There is no basis for concluding, however, that Congress's decision to use slightly different language in those two provisions was intended to signal any difference in approach to the treatment of defendants who possess illegal drugs while on conditional release.

Congress had to refer specifically to "the term of supervised release" in Section 3583(g) because the phrase "original sentence" would have carried a much different meaning in that context. Unlike probation, supervised release is merely a "part of" a sentence of imprisonment, not a separate sentence in its own right. 18 U.S.C. 3583(a); see also 18 U.S.C. 3551(b). Thus, in contrast to probation, which is never accompanied by a term of imprisonment, supervised release is always imposed together with a term of imprisonment. As a result, it is obvious why Congress chose not to require defendants who possess drugs while on supervised release to serve a term of imprisonment "not less than one-third of the original sentence." In the context of supervised release, the phrase "original sentence" refers not merely to the period of supervised release, but to the entire sentence of imprisonment followed by super-

vised release. Thus, use of the phrase "original sentence" in Section 3583(g) would not have achieved Congress's goal of ensuring that defendants who possess illegal drugs while enjoying the benefits of supervised release would serve a prison term of at least one-third the length of their supervised release term.

In the probation context, by contrast, the phrase "original sentence" was sufficient to achieve Congress's purpose, because in that context the "original sentence" is always a term of probation unaccompanied by a term of imprisonment. It was unnecessary for Congress to add a specific reference to probation in Section 3565(a) in order to make its meaning clear. Thus, the difference in wording between the two statutes simply underscores Congress's intent to provide similar treatment for defendants who abuse the privilege of probation or supervised release by possessing illegal drugs. In both cases, Congress intended to ensure that drug-possession violations would be punished particularly severely in relation to other violations of the terms of release. Consequently, in both cases, a floor was placed on the time the violator would spend in prison: one-third of the period for which he had been granted the privilege of conditional release.

E. The Rule Of Lenity Has No Application In This Case Because the Statute Is Not Ambiguous

The court of appeals invoked the rule of lenity to support its interpretation of the statute. See Pet. App. 6a; accord *United States* v. *Diaz*, 989 F.2d at 393; *United States* v. *Clay*, 982 F.2d at 965. As this Court has repeatedly explained, however, "the 'touchstone' of the rule of lenity 'is statutory ambiguity.'"

Bifulco v. *United States*, 447 U.S. 381, 387 (1980) (quoting *Lewis* v. *United States*, 445 U.S. 55, 65 (1980)). The rule of lenity comes into play only when, after "[a]pplying well-established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U.S. at 410, there is still a "grievous ambiguity or uncertainty in the language and structure of the Act" *Chapman* v. *United States*, 111 S. Ct. 1919, 1926 (1991). See also *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (court should rely on lenity only if, "[a]fter seiz[ing] everything from which aid can be derived," it is "left with an ambiguous statute"); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) ("we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute").

There is no ambiguity here. As explained above, the phrase "original sentence" is susceptible of only one interpretation in the context of Section 3565(a): it refers to the original sentence of probation that was actually imposed on the defendant. The courts of appeals that have rejected that interpretation appear to have done so not because of any "grievous ambiguity" in the language of the statute itself, but rather because they view it as an unduly harsh penalty for the possession of illegal drugs by probationers.[6] That decision was for Congress, not the

[6] See, *e.g.*, Pet. App. 10a-11a ("reading the provision as the government argues is a form of legal alchemy that would lead to unreasonably harsh results not clearly intended by Congress"); *United States* v. *Diaz*, 989 F.2d at 393 ("A sentence of imprisonment amounting to twice the amount of time per-

courts, to make, and the rule of lenity does not authorize courts to override clear congressional intent merely in order to avoid what they view as a harsh outcome. See *Gozlon-Peretz* v. *United States*, 498 U.S. at 410 (rule of lenity does not reflect "an overriding consideration of being lenient to wrongdoers"). Accordingly, the rule of lenity has no application in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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missible under the maximum sentence at the time the offense was committed is harsh.").

APPENDIX

STATUTES AND GUIDELINES INVOLVED

1. 18 U.S.C.

§ 3565. Revocation of probation.

(a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may * * *—

(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance * * * the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

(b) Mandatory Revocation for Possession of a Firearm.—If the defendant is in actual possession of a firearm * * * at any time prior to the expiration or termination of the term of probation, the court shall * * * revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

* * * * *

§ 3583. Inclusion of a term of supervised release after imprisonment.

(a) In General.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment * * *.

* * * * *

(e) Modification of Conditions or Revocation.—The court may * * *—

(1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release, * * * if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release * * *;

(3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised reelase wtihout credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release; or

(4) order the person to remain at his place of residence during nonworking hours * * *.

* * * * *

(g) Possession of Controlled Substances.—If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.

2. Sentencing Guidelines (1989):

Chapter 5, Part A—Sentencing Table.

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5,6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	*
6	0-6	1-7	2-8	6-12	*	*
7	1-7	2-8	4-10	*	*	*
8	2-8	4-10	6-12	*	*	*
9	4-10	6-12	*	*	*	*
10	6-12	*	*	*	*	*

* * * * *

§ 5B1.1. *Imposition of a Term of Probation*

(a) Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized:

(1) if the minimum term of imprisonment in the range specified by the Sentencing Table in Part A, is zero months;

(2) if the minimum term of imprisonment specified by the Sentencing Table is at least one but not more than six months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in § 5C1.1(c)(2) (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

* * * * *

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

§ 5B1.2. *Term of Probation*

(a) When probation is imposed, the term shall be:

(1) at least one year but not more than five years if the offense level is 6 or greater;

(2) no more than three years in any other case.

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